In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1106

DAVID RATKE AND MONROE CAINE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, p. 20) has not yet been reported. A previous opinion is reported at 316 F. 2d 225.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1965. A petition for rehearing was denied on March 26, 1965. The petition for a writ of certiorari was filed on April 26, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

After the court of appeals reversed a conviction and remanded for a new trial, the district court de-

773-166—65

nied a motion to dismiss the indictment on various grounds which had been briefed on the prior appeal but not discussed in the opinion of that court. The question presented is whether the court of appeals erred in refusing to rule specifically on these questions after the decision of the district court before retrial of petitioners.

STATEMENT

In 1961, petitioners were convicted in the United States District Court for the Eastern District of Michigan of use of the mails in a scheme to defraud the public in the sale of a product for automobiles (known as the Turbo-Jet Converter) advertised as a method of saving gasoline. On appeal, petitioners contended that the indictment failed to allege an offense in that the mailings were not in furtherance of the scheme; that they had obtained immunity from prosecution because of testimony before the Federal Trade Commission; that acquittal of two co-defendants necessarily required that they be acquitted; that the evidence was insufficient to support the conviction; and that there were errors in the judge's charge to the jury and in his rulings on the admissibility of evidence. The court of appeals held that there were errors in the charge and rulings on evidence. As to the sufficiency of the evidence it ruled that the record before it lacked the clarity needed for adequate consideration of this asserted ground for reversal, and stated that it did not pass on this question but chose to grant a new trial. 316 F. 2d 225. It did not discuss the other arguments advanced—contentions

which, if accepted, would have required dismissal of the indictment.

After the case was remanded to the district court and set for trial in January 1964, petitioners filed a motion to dismiss the indictment, again contending, *inter alia*, that the indictment did not state an offense; that they were immune from prosecution; and that the acquittal of their co-defendants required that they be acquitted as well. The district court denied the motion on February 6, 1964. In its opinion, the district court noted that most of the grounds urged had been presented to the court of appeals on the appeal from the original conviction, and that the grant of a new trial indicated that petitioners' arguments had not been adopted by that court. It nevertheless considered each of the issues raised and found them to be without merit (Pet. App. 14–18).

Petitioners sought to take an interlocutory appeal pursuant to 28 U.S.C. 1292(b) and leave to do so was originally granted by the court of appeals (Pet. App. 19). However, on the government's motion, the court of appeals dismissed the appeal, holding that the order appealed from was not a final decision of the district court and that interlocutory appeals under 28 U.S.C. 1292(b) are limited to appeals in civil actions (Pet. App. 20–21).

ARGUMENT

It is of course clear beyond dispute that the denial of a motion to dismiss an indictment is not an appealable order. This case differs from the ordinary case in which such a motion is made and denied in only

one respect: the same contentions advanced in the motion had been previously advanced and argued before the court of appeals on a prior appeal, although they were not discussed by that court in its opinion. If petitioners' case is distinguishable from other attempts to secure review of interlocutory orders entered in criminal cases, it would have to be on the theory that this Court may properly direct the court of appeals to grant what amounts to an untimely petition for rehearing. We know of no precedent for such a suggestion. Moreover, we question the premise implicit in petitioners' claim that this case calls for extraordinary measures—the assumption that the court of appeals did not consider the contentions made before it on the initial appeal. That court's failure to discuss those contentions in its opinion does not warrant the inference that they were not considered. Rather, the court of appeals' determination that the matter should be remanded for a new trial may fairly be said to reflect a conclusion that the indictment stated an offense and called for trial. It is accordingly submitted that the case should proceed in ordinary course and that the petition seeking review of the interlocutory order of the district court should be denied.

ARCHIBALD COX,
Solicitor General.

FRED M. VINSON, JR.,
Acting Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

MAY 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965